I hold that the order of the Assistant Registrar did not constitute a "grant" to the appellant.

As to the second question: no authority was quoted to me in support of the proposition that an administrator can be sued in respect of a debt due by the deceased before letters of administration have been granted to him: as regards the position of an executor the Privy Council has laid down the general proposition that he cannot be sued, "It is perfectly clear that Susy Fernando Bastian Appu, not having obtained a grant of probate, did not represent the estate of the deceased in the creditor's action"; *cf. Mohimadu Mohideen Hadjar* v. *Pitchey,* (1894) App. Cas. at p. 443: there being no statutory provision in Johore to the contrary, I think the Court must accept that general proposition as being correct with reference both to an executor and to an administrator: consequently I hold that an administrator cannot be sued in respect of a debt due by the deceased, until letters of administration have been granted under seal.

Appeal allowed.

Solicitors: *S. C. Goho & Co.; Donaldson & Burkinshaw.*

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[187] PRIVY COUNCIL REPORTS

TAN AH BOON v. THE STATE OF JOHORE

[P.C. (Lords Blanesburgh, Russell of Killowen and Roche) May 21, 1930]

[Privy Council Appeal No. 57 of 1935]

Land — Occupation under approved application — Default in payment of rent — Recovery by sale of movable property — Johore Land Enactment, Part VII; Land Rules, rule 8.

In 1917 and 1918 the appellant, who had been in occupation of land at Jeram Batu Johore for some years previously, applied for the grant of the land in question to him by the State. Pending approval of this application he continued to occupy the land. In July 1922 the Collector of Land Revenue by letter signified approval of the alienation to the appellant of 110 acres of the state land on the terms and conditions set out in the Land Enactment, 1910 and Rules thereunder and subject to payment of a premium and an annual rent. The appellant made a deposit of the premium and the first year's rent and certain survey fees in compliance with the request contained in the letter. A grant in the form prescribed by the Land Enactment was, however, not issued to the appellant. The appellant paid rent for 6 years but made default in payment of rent on 1st January, 1929 and again on the 1st January, 1930. In July 1939 the Collector proceeded to apply for attachment of the movable property for the recovery of arrears of rent and to put the land up for sale by public auction. The sale proved abortive. In the following year the land was sold for an amount which after deduction of what was due for rent was paid over to the appellant. Until an order for possession was made against him, the appellant was still in occupation. The land was resold at an enhanced price in 1933. In an action by the appellant for damages for breach contract,

Held: that the appellant, owing to his serious default in the payment of rent, was precluded from maintaining the claim.

The judgment of the Johore Court of Appeal, reported sub. nom. *The State of Johore* v. *Tan Ah Boon,* in [1934] M.L.J. 142 upheld.

PRIVY COUNCIL APPEAL by Tan Ah Boon *in forma pauperis* to the Privy Council from a judgment of the Johore Court of Appeal (Huggard C.J., Thorne and Gerahty JJ.) dated the 19th April 1934, allowing an appeal against a judgment of Bailey J., dated the 21st December, 1933.

The facts sufficiently appear from the headnote above.

Sir Gerald Hurst, K.C., and *C. D. Myles* for the appellant. The issues are:

1. Whether by the letter of 25th July, 1922 the land was alienated to us on the terms and conditions set forth in the Land Enactment, 1911.

2. Whether, having let us go into occupation and spend money on the land the State is estopped from saying that Part VII of the Land Enactment does not apply.

3. Whether the State exhausted its remedies under Part VII before proceeding to sell the land.

4. Whether the conduct of the State was consistent with rescission of the contract, (which however was never pleaded).

The question of whether we had an equitable title or no is irrelevant as the suit was in contract.

The approval of the appellant's application was given in 1922 but by 1931 no grant had been issued.

Lord Roche: — Is there any evidence as to why the grant was not issued?

Sir G. Hurst: — None.

"Alienate" by the Land Enactment, means to sell or otherwise dispose of. The letter was a contract to grant us the land and therefore constituted alienation. Under Part VII when rent is in arrear the necessary steps for recovery are notice, attachment of movables, and finally sale of the land itself. The fact that there was other movable property on the land beside the pigs which were attached, is undisputed. The State must exhaust its remedies before selling the land. It did not do so in this case and the sale was therefore illegal. Exhibit E(1) (the general adviser's letter of 24th November, 1931 to the appellant) clearly shows that the officers of the Government of Johore had acted under Part VII of the Land Enactment. The fact that $268.50 the excess of the amount realised by the sale over the amount due for rent, had been refunded to the appellant showed the same thing. The pleadings in *Tan Tye Nguan* v. *Tan Ah Boon* [Exhibit C(1)] show that the plaintiff in that case, who was the assignee of the purchaser at the sale claimed by virtue of a sale for arrears of rent. He succeeded in this plea and the appellant was turned out of his land.

Lord Russell: — It is a question whether, the sale being illegal, the appellant's proper remedy was not to have appealed against the judgment in that case. If the present contention is correct, the appellant is still the owner of the land.

Sir G. Hurst: — In the statement of defence filed on behalf of the State there is no plea of rescission of the contract, and the judgment of Bailey J. finds that there was nothing in the [188] conduct of the State consistent with rescission. The judgment of the Court of Appeal states that the State rescinded the contract but in fact there is no evidence upon which this can be found. [188]

The judgment of the Court of Appeal lays down that alienation is not complete until the issue and registration of a grant. But "land" in section 59 of the Enactment means land already comprised in a grant, and this section does not apply to the passing of an interest from the State to an individual. The system of registration of title does not profess to prohibit contracts in reference to land, provided such contracts do not attempt to transfer or deal with the land itself. [*Haji Abdul Rahman* v. *Mohamed Hassan*, [1917] App. Cas. at p. 214].

The letter of 25th July, 1922 was a valid contract without registration. It is a valid and concluded contract. The State was not entitled to rescind as we had committed no breach going to the root of the contract, [*Cornwall* v. *Henson*, [1900] 2 Ch. 298].

Nor, in fact, did it rescind. Assuming a valid contract not rescinded, was it broken by the State? The breach was the failure to issue a grant.

Lord Blanesborough:—In view of the fact that the Enactment allows of special conditions being inserted in the grant, is approval a contractual act?

Sir G. Hurst: — All the procedure followed by the State suggests that we are in the position of a man who has a title. [Counsel then dealt in detail with Part VII of the Land Enactment].

The State did not exhaust its remedies therefore the sale was illegal.

C. D. Myles: — Alienation means the passing of an interest from the State to an individual. Sale by auction is one kind of disposal of land (section 53). Contract of sale is another. We are trying to establish a contract not saying that there is a title. Alienation is not necessarily giving a title, it is selling, leasing or otherwise disposing of land (section 2). The conditions which are binding on grants are in the main laid down by the Enactment, sections 5, 6, 7, 8, 11, 26, 27 and 55. If there were to be any further conditions they would be specified at the time the contract was made. It is submitted that the terms of the grant are sufficiently defined in the letter of 25th July, 1922 that they could have been settled by a Judge in chambers.

Lord Blanesborough: — That was a test laid down by Jessel M.R. of whether a valid contract had been concluded or not.

C. D. Myles: — It was admitted by the Legal Adviser on behalf of the State that there was a contract.

Lord Russell: — I do not think there is any such admission on the record.

C. D. Myles: — If *A.* contracts to sell land to *B.* and subsequently contracts to sell to *C.* it is submitted that this constitutes a breach of his contract with *B.*

Gavin Simonds, K.C., *G. D. Johnston*, and *M. C. Hay* for the respondent: — The grounds of this action have shifted slightly since it was begun. In the lower Court it was fought in contract, but in the Court of Appeal counsel for the respondent (now appellant) contended that he had an equitable title. The appellant now is founding his claim purely on breach of contract. The Johore law of contract is to be found in the Federated Malay States Contract and Specific Relief Enactments which are made law in Johore by the Courts Enactment. Assuming that there was a contract, it contained the following obligations, *inter alia*: — an obligation on the applicant to make a continuing payment, and an obligation on the State to make a grant. Appellant's occupation prior to approval was illegal. The State waived the illegality and undertook to grant the land and to allow him to remain in occupation pending the issue of the grant provided he deposited certain fees and paid rent annually from the 1st January, 1922. This rent was due in advance. Paragraph 3 of the letter of 25th July, 1922 is merely a stereotyped form. It was clear from the applications that the appellant was already in occupation. Was the State entitled to say, at the time of the alleged breach, that the appellant had already broken his agreement? Was the appellant entitled to say that he was at all material times ready and willing to perform? In May 1929 the appellant defaulted. In May 1930 a notice was issued. On 30th July, 1930 a warrant of attachment of movables was issued. Officers of the Government of Johore came on to the land where appellant was living and attached certain property and issued a notice of attachment. In September 1930 the abortive auction was held on the appellant's land. In 1930 and 1931 appellant also defaulted. A notice of sale of land was issued and in 1931 the land was put up to auction. All these proceedings gave appellant ample notice that the State intended to treat the contract as at an end if he did not pay, yet at no time did the appellant offer to pay. Anyone who sues for breach of contract must allege and prove that he was willing to perform his part [189] of the contract, [*Bullen & Leake* Precedents of Pleading, IXth ed.: p. 286]. In some cases non-payment of money has not been held a sufficient breach to disentitle a plaintiff, it is a question of fact in each case. [*Anson's* Contract, XIVth ed.: p. 354, *Millars* v. *Weddell*, 100 L.T. 128]. In *Cornwall* v. *Henson* only one instalment of the purchase price remained unpaid. And in view of section 24(a) and (b) of the Specific Relief Enactment it does not appear that *Cornwall* v. *Henson* could ever apply in Johore. [189]

Lord Blanesborough: — It may be a question how far *Walsh* v. *Lonsdale* applies.

Gavin Simonds, K.C.: — The appellant has put his case in contract. The land system of Johore is registration of title which does not allow the creation of equitable estates. The words "voidable" and "rescission" are used in the Contract Enactment somewhat differently from the way in which they are used in English law. Section 54 says that when a contract consists of reciprocal promises and the party who is to perform first fails to do so, the other party need not perform his part. Section 55 says that where time is of the essence and a promisor fails to perform his promise in time the contract is *voidable* at the option of the promisee. Section 64 says, "When a party at whose option a contract is voidable *rescinds* it . . . etc." The act of the State in treating the contract as at an end was rescission in the meaning of the Enactment. It might possibly appear that the State was at fault because of the long delay in issuing the grant. But

from the complete absence of any complaint on this score it must be assumed that the delay was accepted as reasonable by both sides. The position is that a grant cannot be issued until the land has been surveyed and the custom is to wait until there are a sufficient number of applications in one locality to justify the expense of sending a surveyor and his gang of coolies up-country.

If the foregoing contentions are right it is immaterial to consider whether Part VII of the Land Enactment applied in this case or not. It is however submitted that it cannot apply. It refers to land to which there is a title and cannot apply where there is no title. Further, section 90 refers to the passing of the interest in the land from the owner to the State. If there is no interest to pass this Part cannot apply.

If Part VII does apply, were its provisions properly carried out? It is submitted that they were. The word "may" must be permissive, not mandatory. If it is mandatory, the words "may seize any effects .... to whomsoever belonging, which may be found on the land" would force the State to take a course involving the maximum hardship to others.

Finally, if the appellant be entitled to damages, what are the damages. Even if a grant had been issued, he would have defaulted just the same, the same procedure would have been followed and the land would have been sold. If the sale was really illegal the remedy was to have carried the appeal against the order of ejectment up to this tribunal.

Sir G. Hurst, K.C., in reply: — It has already been held that the State is bound under Part VII to exhaust its remedies before selling th land. (*Tham Hing Kwai* v. *State of Negri Sembilan,* [1931-32] F.M.S.L.R. 52, 263; [1932] M.L.J. 31).

Although the sale was illegal the appellant had a choice of remedies. The State by contracting to sell to another person had put it out of its own power to fulfil its contract and appellant was entitled to sue for damages for breach.

Cur. Adv. Vult.

The judgment of the Board was delivered by —

Lord Roche: This is an appeal from the judgment of the Court of Appeal of the State of Johore which set aside a judgment of Savage Bailey J. in favour of the appellant and ordered that judgment should be entered for the respondent State.

The action of the appellant was for damages for breach of contract and was begun by plaint dated 6th June, 1933. The circumstances out of which the action arose may be stated shortly as follows:

For some years prior to 1917 the appellant had settled upon certain state land at Jeram Batu in Johore and began to clear and plant it. In 1917 and 1918 he made application that the land in question might be granted to him by the State and pending approval of his application continued to occupy the land. On 25th July, 1922, the Collector of Land Revenue by letter of that date dealt with the application and signified approval of the alienation to the appellant of 110 acres of State land on the terms and conditions set out in the Land Enactment, 1910 and Rules thereunder and subject to a premium of 5 dollars per acre and an annual rent of 3 dollars per acre. The letter required the premium and first year's rent and certain survey fees to be deposited if the appellant desired to avail himself of the terms offered. The appellant made the deposit and so availed himself of the terms.

The Land Enactment, 1910 provides that a grant of land of such an area as is in question must be in a certain form and be sealed with the seal of the State and also required registration of such instrument in order that it should be effec- [190] tual. Part VII [190] of the Enactment provided for recovery of land revenue in arrear thus: Written notice of demand is first required: then on default in meeting the demand attachment of personal property of the defaulter and of any effects on the land to whomsoever belonging is allowed: then if the foregoing procedure proves ineffective for the recovery in full of the arrears the land may be sold after notice.

For reasons of which no evidence or explanation is to be found in the record the land was not surveyed nor was any grant executed or registered. But as no complaint was made with regard to this by either side in the action their Lordships must assume that this delay was consented to by both parties. The appellant paid his rent for 6 years, that is to say, down to the end of 1928. He did not pay the rent due on 1st January, 1929, or that due on 1st January, 1930. The Collector then in July, 1930, proceeded under the abovementioned machinery for attachment of personal property and then for sale of the land. Some pigs were seized but on the auction there were no bidders and when the land was first put up for sale there were no bidders for it. It was, however, sold a year after the first seizure of goods, that is to say, in October, 1931, for 925 dollars. The appellant was still occupying the land and apparently did so until, at the suit of the purchaser, an order for possession was made against him in March, 1933, and was affirmed on appeal in June, 1933. No rent in respect of this continued occupation was paid by the appellant. On the contrary, the respondents paid over to him after sale of the land the balance of 268 dollars remaining out of the sale price of 925 dollars after satisfying their claim for rent due in 1929 and 1930. This action was, as appears from certain official minutes, based on a decision to treat the appellant in this matter as he would have been treated had he had a regular and registered title.

The land so disposed of was apparently resold at a considerably enhanced price and on 6th June, 1933, this action was brought claiming damages for breach of contract. The basis of the claim was that the letter of 25th July, 1922, accepted by payment of a deposit was a contract entitling the appellant to a grant of the land and to possession of it: that the sale of the land was wrongful and a breach of contract in that there was an insufficient exercise of the power of seizure and sale of movables before resort was had to the land. There were, in fact, more movables on the land than were seized, which probably would have realised more than enough to pay the arrears of rent.

On these facts, the trial Judge held there was a trespass and a breach of contract as alleged and awarded 17,500 dollars as damages. Upon appeal this judgment was reversed and it was held that there was no action wrongly committed or breach of contract and that accordingly no damages were recoverable. The question of the amount of damage, if any, was not investigated upon appeal.

Before their Lordships a considerable number of questions were debated, some of them questions of difficulty and importance. Such questions were: Was there a contract between the parties and in the absence of a grant had the appellant any rights which could be enforced by action? Did the procedure laid down in Part VII of the Land Act apply as a matter of obligation to land which was not the subject of a grant? What was the true construction of the provisions of Part VII as to the conditions preliminary to sale of the land and in particular must resort be had to all and every piece of movable property before resort to the land or was it sufficient if a *bona fide* exercise of discretion in this matter was exercised by the Collector? Their Lordships think it both unnecessary and undesirable to express any opinion on any of these points — all the more because with regard to some of them the information and evidence available is far from complete. This case in the opinion of their Lordships can and should be decided on a much simpler ground. This is simply a common law action seeking damages for breach of an alleged contract, and nothing else. No plaintiff can maintain such an action unless he can aver and prove that he has performed or has at all times been ready to perform his part of the contract. This the appellant, owing to his serious default in payment of rent, was incapable of doing.

In these circumstances their Lordships are of opinion that the appellant was not entitled to succeed in his action and that the Court of Appeal was correct in ordering that the claim should be dismissed.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant, by leave of His Majesty in Council, entered and prosecuted this appeal *in forma pauperis* and there will accordingly be no order as to the costs of the appeal.

Appeal dismissed.

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[191] STRAITS SETTLEMENTS REPORTS

PUBLISHED BY AUTHORITY

IN THE MATTER OF THREE ADVOCATES AND SOLICITORS

[O.C.J. (Huggard C.J. and Terrell J.) May 9, 1935]

[Singapore Originating Motion No. 10 of 1935]

Advocates and Solicitors — Striking off the roll — Application by motion made ex parte — Validity of order made thereon — Affidavits — Whether filing after order applied for amounts to an irregularity — Advocates and Solicitors Ordinance, No. 32 of 1934, s.26; Civil Procedure Rules, 1934, O.49, r.4; O.36, r.19.

Although section 26 of the Advocates and Solicitors Ordinance, 1934, does not specifically provide that applications for an order to show cause thereunder shall be made *ex parte*, such applications nevertheless fall within Order 49, rule 4 of the Civil Procedure Rules, 1934, and notice thereof need not be given to the parties to be affected thereby.

Provided that affidavits setting forth facts upon which an *ex parte* order is sought are filed at the same time as the motion itself, there can be no objection to further supplementary affidavits being made and filed prior to the hearing of the motion. *In re King & Co.'s Trade Mark,* (1892) 2 Ch. 462 applied.

Motions, filed on behalf of the respondents to the above originating motion, to set aside for irregularity an *ex parte* order made under section 26 of the Advocates and Solicitors Ordinance dismissed.

ORIGINATING MOTION.

Withers-Payne, Koek and *Cobbett* each representing one of the respondents.

Adrian Clark (Solicitor-General) for the Attorney-General.

Cur. Adv. Vult.

The judgment of the Court (Huggard C.J. and Terrell J.) was as follows:—

Huggard C.J. and **Terrell J.**: On the 8th April, 1935, this Court made an order under section 26 of the Advocates and Solicitors Ordinance, 1934, calling upon three advocates and solicitors (in this judgment referred to as "the respondents") to show cause why each of them should not be struck off the roll or suspended from practice or censured on the ground that he had been guilty of improper conduct in the discharge of his professional duty. This order was made *ex parte.*

On the 11th April, 1935, motions were filed on behalf of each of the respondents for an order that the order of the 8th April be set aside for irregularity.

The first ground upon which it is sought to set aside the order in question is, in effect, that the order should not have been made *ex parte* and that notice of the original motion should have been served on each of the respondents in the manner prescribed for service of writs of summons.

In support of the respondents' contention on this point reference was made to the law governing the procedure to be adopted on applications of this nature as it existed prior to the 1st January, 1935. Prior to that date provision was made for such applications in section 92 of Ordinance No. 101 (Courts), and the particular sub-sections of that section which are relevant to the present matter read as follows:—

(1) Applications that an advocate and solicitor may be suspended from practice, or that he may be struck off the rolls, shall be by motion for an order calling upon the advocate and solicitor to show cause.

(3) A copy of the affidavit upon which the order was granted shall be served with the order upon the advocate and solicitor named in the order.

(4) If the advocate and solicitor named in the order is or is believed to be within the Colony, the provisions of the Civil Procedure Code for service of writs of summons shall apply to the service of the order.

(5) If the advocate and solicitor is not within the Colony, the Court may give such directions for the service of the order, or for notice thereof, as it thinks fit, or may proceed to make the order absolute *ex parte.*

(6) Any order absolute, made in cases where personal service of the order to show cause has not been effected, may be set aside on the application of the advocate and solicitor, on good cause being shown.